MOTION FILED

SEP - 4 1997

3

No. 97-228

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

GAMMA-10 PLASTICS, INC.,

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
and AMERICAN PRESIDENT COMPANIES, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF *AMICUS CURIAE* OF PROFESSOR THOMAS J. SCHOENBAUM

In Support of the Position of Petitioner

THOMAS J. SCHOENBAUM
Pro Se
Dean Rusk Center for International
and Comparative Law
The University of Georgia
School of Law
Athens, Georgia 30602-6020
(706) 542-5140

16 pp

THOMAS J. SCHOENBAUM'S MOTION TO FILE AN *AMICUS CURIAE* BRIEF

I, Thomas J. Schoenbaum, hereby respectfully move this honorable Court for an Order permitting me to file an *amicus curiae* brief in the above-captioned matter on behalf of the petitioner. The respondents, American President Lines, Ltd., and American President Lines Companies, Ltd., refuse to give written consent to my participation.

My interest in this case is sincere. I am the Executive Director of the Dean Rusk Center for International and Comparative Law at the University of Georgia, a Professor of Law at the University of Georgia School of Law, and the author of the treatise *Admiralty and Maritime Law* (West, 2d ed. 1994). I am deeply concerned about the proper development of maritime law.

The decision of the United States Court of Appeals for the Eighth Circuit creates a conflict among the Circuits concerning an important issue of maritime law and opens the door to exoneration of ocean carriers for their negligence and breach of contract in a manner contrary to Congress's intent in both the Harter Act, 46 U.S.C. § 190, and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1301(e).

For these reasons, I respectfully ask this Court to issue an Order allowing me to file the attached *amicus curiae* brief in this case.

THOMAS J. SCHOENBAUM
Pro Se
Dean Rusk Center for International and
Comparative Law
The University of Georgia
School of Law
Athens, Georgia 30602-6020

TABLE OF CONTENTS

PAGE

Thomas J. Schoenbaum's Motion to File an *Amicus Curiae* Brief i

Table of Authorities iv

Statement of Interest of Thomas J. Schoenbaum 1

Statement of the Case 3

Reasons for Granting the Writ 4

I. The Jury Instructions Indicate That the Carrier Is Exonerated from its Negligence and Breach of Contract by Compliance with Mandatory Port Regulations 4

II. The Eighth Circuit Court of Appeals Has Adopted a Broad and Incorrect Rule with Regard to the Effect of Compliance with Mandatory Port Regulations That Conflicts with Decisions of Other Courts of Appeals 6

III. The Jury Instructions Did Not Adequately Instruct the Jury as to the Carrier's Duty of Proper Delivery 7

Conclusion 9

TABLE OF AUTHORITIES

PAGE

Cases:

Allied Chem. Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro, 775 F.2d 476 (2d Cir. 1985) 4

Allstate Ins. Co. v. Imparca Lines, 646 F.2d 166 (5th Cir. 1981) 6

Atlantic Parco, Inc. v. Maersk Lines, 740 F. Supp. 1002, 1991 AMC 148 (S.D.N.Y. 1990) 7

Constable v. National S.S. Co., 154 U.S. 51 (1894) 6

David Crystal Inc. v. Cunard Steamship Co., 339 F.2d 295 (2d Cir. 1964) 4

F.J. Walker Ltd. v. M/V Lemoncore, 561 F.2d 1138 (5th Cir. 1977) 6

Farrell Lines v. Highlands Inc. Co., 696 F.2d 28 (2d Cir. 1982) 6

Gamma 10 Plastics v. American President Lines, 105 F.2d 387 (8th Cir. 1997) 3

Insurance Co. of North America v. S/S Italica, 567 F. Supp. 59 (S.D.N.Y. 1983) 7

PAGE

Isthmian Steamship Co. v. California Spray-Chemical Corp., 300 F.2d 41 (9th Cir. 1962).....6

Italusa Corp. v. M/V Thalassini Kyra, 733 F. Supp. 209, 1990 AMC 1356 (S.D.N.Y. 1990).....7

Sprague & Rhodes Commodity v. M/V Procer Fulgencio Yegros, 617 F. Supp. 911, 1985 AMC 2041 (S.D.N.Y. 1985).....4

Tan Hi v. United States, 94 F. Supp. 432 (N.D. Cal. 1950).....6

Tapeo Nigeria Ltd. v. M/V Westwind, 702 F.2d 1252 (5th Cir. 1983).....6

Statutes:

46 U.S.C. § 190.....i,1,3,4

46 U.S.C. § 1301(e).....i,1,3,4

PAGE

Secondary Sources:

Judith Meyer, *In Another Country: The Effect Of Mandatory Port Law Upon Statutory Duties Of Discharge And Delivery -- Tapco Nigeria v. M/V Westwind*, 9 Mar. Law. 123 (1984)..... 6

Thomas J. Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994).....i, 1

STATEMENT OF INTEREST OF THOMAS J. SCHOENBAUM

I appear in this case as *amicus curiae*.[1] I am the Executive Director of the Dean Rusk Center for International and Comparative Law at the University of Georgia, a Professor of Law at the University of Georgia School of Law, and the author of the treatise *Admiralty and Maritime Law* (West, 2d ed. 1994). I am an attorney who for more than the immediately preceding three years has been admitted to practice in the highest courts of the States of Georgia, North Carolina, Louisiana, and Illinois.

My interest in this case is the preservation of a fair allocation of risk between ocean shippers and ocean carriers in accordance with Congressional intent as expressed in both the Harter Act, 46 U.S.C. § 190, and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1301(e). The decision of the

---

[1]The position presented in this brief is solely my own. It does not necessarily represent the position, if any, of the Dean Rusk Center for International and Comparative Law or of the University of Georgia School of Law.

Pursuant to Supreme Court Rule 37.6, I state that I authored this brief in whole, with the exception that counsel for petitioner informed me of the need for, and assisted me with, this footnote and made editorial suggestions concerning the main text, some of which I adopted. Petitioner will be paying the cost of printing and serving this brief.

I have no involvement with the above-captioned matter other than having served as an expert witness at the request of plaintiff's counsel in the federal district court. For this service I was paid a fee. I do not represent any party in this case at the present time and I did not and will not receive any fee or expenses in return for preparing this *amicus curiae* brief.

United States Court of Appeals for the Eighth Circuit allows ocean carriers, who generally have superior bargaining power over shippers, to be exonerated from their own negligence and breach of contract in circumstances where goods are shipped to a foreign port controlled by foreign port authorities. This important decision not only creates a vast exception to the allocation of risk set forth in the Harter Act and the Carriage of Goods by Sea Act, but also creates a conflict among the Circuits concerning a significant issue of maritime law.

STATEMENT OF THE CASE

This case, *Gamma 10 Plastics v. American President Lines*, 105 F.2d 387 (8th Cir. 1997), involves the important and interesting matter of the conflict between the carrier's duty under both *The Harter Act*, 46 U.S.C. § 190, and *The Carriage of Goods by Sea Act* (COGSA), 46 U.S.C. § 1301(e), to properly deliver goods entrusted to it, and the doctrine that a carrier can disclaim responsibility when it turns cargo over to foreign port authorities under mandatory port regulations.

It is not disputed that in this case the goods carried by the carrier, American President Lines (APL), were damaged. It is also undisputed that the goods were damaged because they were "devanned" (removed from the container in which they were packed) and left out in the open. The only dispute is who devanned the goods and when. Gamma 10 contends the goods were devanned by APL prior to the arrival of the cargo in Shanghai; APL contends that the goods were devanned by either the Chinese port authorities or APL after the shipment reached Shanghai in compliance with mandatory port regulations.

Though the jury did not find who devanned the goods or when, it found in favor of APL. However, the jury instructions under which the jury deliberated were confusing and a misstatement of what the law should be relating to the carrier's duty of proper delivery in a case involving mandatory port regulations. The Eighth Circuit's affirmance of those instructions creates a serious conflict among the courts of appeals and an unsound rule of law that the Supreme Court should correct.

REASONS FOR GRANTING THE WRIT

I. THE JURY INSTRUCTIONS INDICATE THAT THE CARRIER IS EXONERATED FROM ITS NEGLIGENCE AND BREACH OF CONTRACT BY COMPLIANCE WITH MANDATORY PORT REGULATIONS

The jury instructions given in this case mean that the carrier is exonerated from responsibility for damaged cargo by compliance with mandatory port regulations. In other words, the jury instructions virtually command that a carrier complying with mandatory port regulations cannot be negligent and cannot be in breach of contract. Both Instructions 21 and 21A, read as a whole, create this understanding.

This is dangerous precedent. It opens the door to exoneration of ocean carriers for their negligence and breach of contract in a manner diametrically opposed to Congress's intent in both *The Harter Act*, 46 U.S.C. § 190, and *The Carriage of Goods by Sea Act* (COGSA), 46 U.S.C. § 1301(e). The duty of delivery is a non-delegable duty of the carrier. The carrier is normally strictly liable for misdelivered goods and is responsible for those acting as its agents. *David Crystal Inc. v. Cunard Steamship Co.*, 339 F.2d 295, 298 (2d Cir. 1964); *Sprague & Rhodes Commodity v. M/V Procer Fulgencio Yegros*, 617 F. Supp. 911, 1985 AMC 2041 (S.D.N.Y. 1985). A clause in a bill of lading that relieves the carrier from liability for improper delivery is void by operation of law. *Allied Chem. Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985).

In this case both Instructions 21 and 21A state that, in effect, APL is exonerated if APL complied with port

regulations and the damage occurred while the goods were in the custody of port officials. Neither instruction mentions that proper delivery is a non-delegable duty and that APL certainly remains responsible, at a minimum, for damage caused by its negligence or breach of contract. It is true that a separate Instruction 22 does state that Gamma 10 would prove its claim if it showed that APL was negligent and the negligence was the proximate cause of the damages to the cargo. But this instruction has to do with the proof of the elements of the claim, not with the legal effect of the mandatory port regulations. Instructions 21 and 21A, which are directed to this issue, have the effect of stating that the carrier is exonerated from responsibility for its own negligence and breach of contract by compliance with the port regulations.

II. THE EIGHTH CIRCUIT COURT OF APPEALS HAS ADOPTED A BROAD AND INCORRECT RULE WITH REGARD TO THE EFFECT OF COMPLIANCE WITH MANDATORY PORT REGULATIONS THAT CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The Eighth Circuit in this case has adopted a broad view of compliance with mandatory port regulations that conflicts with decisions in other Circuits. The source of the doctrine appears to be *Tan Hi v. United States*, 94 F. Supp. 432, 435-36 (N.D. Cal. 1950) following dicta contained in a decision of this court, *Constable v. National S.S. Co.*, 154 U.S. 51, 53 (1894).

The *Tan Hi* court, however, clearly did not imply that following port regulations creates a safe harbor; rather the rule is a small exception to the duty of proper delivery. *See Tapeo Nigeria Ltd. v. M/V Westwind*, 702 F.2d 1252 (5th Cir. 1983); and *Note*, *In Another Country: The Effect Of Mandatory Port Law Upon Statutory Duties Of Discharge And Delivery -- Tapco Nigeria v. M/V Westwind*, 9 Mar. Law. 123 (1984).

Decisions in other circuits have construed *Tan Hi* narrowly: the carrier remains liable where damage occurred due to the carrier's negligence. *See F.J. Walker Ltd. v. M/V Lemoncore*, 561 F.2d 1138 (5th Cir. 1977); *Allstate Ins. Co. v. Imparca Lines*, 646 F.2d 166 (5th Cir. 1981); *Isthmian Steamship Co. v. California Spray-Chemical Corp.*, 300 F.2d 41 (9th Cir. 1962); and *Farrell Lines v. Highlands Inc. Co.*, 696 F.2d 28 (2d Cir. 1982).

III. THE JURY INSTRUCTIONS IN THIS CASE DID NOT ADEQUATELY INSTRUCT THE JURY AS TO THE CARRIER'S DUTY OF PROPER DELIVERY

The jury instruction in this case failed to instruct the jury regarding the proper elements of the carrier's duty of proper delivery. The only instruction to deal with this point explicitly was Instruction No. 21, which defined the duty as "either to deliver the cargo to the consignee or to deliver it to a fit wharf and to take reasonable steps to safeguard it until the shipper or a consignee had a reasonable opportunity to claim the cargo."

This instruction neglects crucial elements of the duty of proper delivery. Two points of failure are especially notable. First, the instruction fails to mention the duty of proper delivery requires the carrier to notify the shipper/consignee of the cargo's arrival.

Numerous cases hold that this notification duty is an integral part of the duty of delivery. *E.g.*, *Atlantic Parco, Inc. v. Maersk Lines*, 740 F. Supp. 1002, 1991 AMC 148 (S.D.N.Y. 1990); *Insurance Co. of North America v. S/S Italica*, 567 F. Supp. 59 (S.D.N.Y. 1983). In the latter case a cargo of wine was discharged on a pier and the wine froze before it was picked up by the consignee. The carrier was liable for breach of its duty "to notify the consignee of the vessel's arrival and to protect the cargo..." Id. at 62.

Second, the delivery instruction fails to state that the duty of proper delivery means that the carrier has an affirmative duty of due care to protect the goods against loss or damage. *Italusa Corp. v. M/V Thalassini Kyra*, 733 F. Supp. 209, 1990

AMC 1356 (S.D.N.Y. 1990). This is not adequately expressed by the instruction which states only that the carrier was required to take "reasonable steps to safeguard" the cargo. The instruction, thus, did not adequately state the legal standard for proper delivery.

CONCLUSION

For the reasons stated, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in order to explore the limits and resolve the conflicting interpretations of the courts regarding the impact of mandatory port regulations on the duty of proper delivery under COGSA and the Harter Act.

THOMAS J. SCHOENBAUM
Pro Se
Dean Rusk Center for International and
Comparative Law
The University of Georgia
School of Law
Athens, Georgia 30602-6020